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IN THE

# Supreme Court of the United States

October Term, 1956

No. 322

GEORGE E. SHIBLEY,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

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No. .....

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**Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.**

The petitioner, George E. Shibley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 18, 1956.

## Opinion Below.

The opinion of the court below (App. A) has not yet been officially reported.

## Jurisdiction.

The judgment of the Court of Appeals (App. B) was entered on June 18, 1956. The time to file this petition for a writ of certiorari was extended to August 17, 1956, by order of Mr. Justice Burton dated July 9, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

## Questions Presented.

1. Whether, contrary to the decisions of this Court in *Offutt v. United States,* 348 U. S. 11, and *Cooke v. United States,* 267 U. S. 517, the history and policy of 18 U. S. C. 401 and Rule 42(a), Federal Rules of Criminal Procedure, and the due process provisions of the Fifth Amendment, the court below erred in holding that the trial judge was qualified to try the summary contempt charges against petitioner and to impose a sentence of imprisonment upon petitioner, despite the fact—as the evidence in the record and the certificate of contempt plainly show—that the contempt charged was entangled with the trial judge's personal feeling against the petitioner.

2. Whether, contrary to law and the due process provisions of the Fifth Amendment, the court below erred in holding that the trial judge had the power and jurisdiction, almost two months after the termination of the trial to conduct a summary contempt proceedings and impose a sentence of imprisonment upon petitioner.

3. Whether, contrary to the history and policy of 18 U. S. C. 401 and Rule 42(a) of the Federal Rules of Criminal Procedure, and in derogation of the rights of an accused to a fair trial and the effective assistance of independent counsel, the court below erred in holding that the evidence in the record was sufficient to support the certificate and judgment of contempt and the sentence of imprisonment imposed therein.

## Statutes Involved.

The pertinent statutes and rules involved are set forth in Appendix C.

## Statement of the Case.

When the trial in the principal cause below was concluded with a verdict of acquittal, the following occurred:

"The Court: The Clerk will record the verdict. Ladies and gentlemen of the jury, . . . I consider your verdict a miscarriage of justice.

If there ever was a simple case presented to a jury, when it is all boiled down on the issues of the case, this was a simple case. . . .

. . . On a verdict of acquittal the Government has no appeal, and that is the end of the case on the counts on which there has been an acquittal. If the defendant is convicted, of course the defendant has an appeal. So that is the end of the counts on which you have returned a verdict. And I tell you that the issue, after all the smoke was blown away, was a relatively simple issue, and if jurors in cases like this bring in this kind of verdict, the Government might well save its money in trying cases involving the United States before juries . . .

. . . I now excuse you, but I suggest you remain in your seats for just a moment. . . .

Mr. Shibley, you accused the officers in the Marine Corps of perjury, you accused Mr. Deutz of dishonesty, you accused me of reading the instructions in such a way as to indicate in one place that I almost shouted that they should convict the defendant, that when I read the alternate propositions on innocence that I used an entirely different tone of voice; you have been repetitious in your objections, and you generally conducted yourself in a way ill fitting a lawyer in this court. You will be here Monday morning at 10:00 o'clock, and the court will take up at that time the matter of summary contempt. . . .

Ladies and gentlemen of the jury, you are excused, you may now withdraw" [R. 2559-63].[1]

**The Summary Contempt Proceedings—the Trial Judge and the Petitioner.**

The proceeding herein is a companion proceeding to *Shibley v. United States, No. 243, petition for certiorari pending in this Court.* The two cases were argued below at the same time, and their connection, stemming from the same background, was noted by the Court of Appeals in both cases (No. 243, App. A, pp. 3-4; App. A, pp. 1-2). We do not repeat much of the background detailed in the Statement of the Case in the companion proceeding (No. 243, pp. 4-310), but in the light of the position taken by the trial judge in the trial and the summary contempt proceeding herein, an example of which has been aforestated, some brief reference to the source of these two proceedings is essential.

Petitioner in 1952 had been a member of the Bar for a period of seventeen years [R. 1226]. In July, 1952, he was retained to represent one John Russell Bennette, a Master Sergeant in the Marine Corps [R. 1227]. As civilian counsel for the aforesaid Marine, petitioner, in defense of his client, was compelled to make serious charges in Washington, D. C., against the Marine Sergeant's military superiors [Ex. 1-A, R. 957]. The content of these charges having come to the attention of the accussed Marine officers, a court of inquiry was convened by the officers at the El Toro Marine Base [R. 1231]. Petitioner was brought before this self-constituted

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[1]References designated "R." are to the Reporter's Transcript of proceedings. References to the Clerk's Transcript of Record below are "C. Tr."

court of inquiry and subjected to a "grilling" which lasted five days [R. 1233-6] and in the course of which he was forcibly brought from his law office by armed members of the Marines to the military establishment [R. 1008-9].

Since the trial judge below overtly indicated his belief that petitioner demeaned himself improperly at the trial, just as he allegedly had done before the military court of inquiry, and since this personal view weighed heavily with the court in these summary contempt proceedings, some discussion of the events which occurred in these military proceedings is pertinent here.

The subject matter of the inquiry was the charges made by petitioner, on behalf of his client, against the Marine officers [R. 1256]. The accused commanding officer convened the "court," appointing three subordinate officers of the court, all laymen [R. 423-4, 433]. A Lieutenant Colonel who was one of the accused officers was designated as a "party" to the proceedings [R. 388]. This entitled him to counsel. (50 U. S. C. 731(c).) Sergeant Bennette requested that he be designated as a party, as was his right (50 U. S. C. 731(c)), but this was denied [R. 510]. Thus, petitioner was blocked from appearing as counsel for his client. Instead, petitioner was subpoenaed as a witness before the court of inquiry [R. 1431-4].

Petitioner was brought before a military body and examined in secret. The "court" had counsel [R. 1010], and so did the Lieutenant Colonel [R. 1010], all military officers. Petitioner, before this secret body, asked for an opportunity "to consult my attorney or attorneys, who I understand are enroute to this station and who I understand will arrive within approximately an hour" [R. 1010]. Here is what occurred: Counsel for the Lieutenant

Colonel objected and stated, "The rule is well established that the truth needs no counsel" [R. 1010]. Counsel for the court stated, "If he wants to have his attorney file a writ of habeas corpus, he may do so" [R. 1010]. The "court" ruled: "The objection of the counsel for the interested party is sustained" [R. 1011].

The sole purpose of the five-day secret interrogation was to compel petitioner to retract his charges against the military officers who thus held petitioner captive, or to detail the sources of his information. The petitioner was told that he had "made his bed" and the time had come for petitioner to "put up or shut up" [R. 1357]. These were the precise words of the military officers. The military officers insisted that all the sources of information which led to petitioner's charges against the officers be revealed to them or "tell this court that he has absolutely no basis for any of his malicious and insulting and derogatory remarks that he directed in that letter to the Commandant of the Marine Corps . . ." [R. 1357].

Thus situated, petitioner declined to answer a number of questions propounded to him. Petitioner asserted that he had been denied the right to counsel. He stated that one of the obvious purposes of the inquiry was to censure him and he therefore had the rights of a party under the Military Code. He contested the jurisdiction of the court of inquiry. He challenged the power of the commanding officer under the law to convene the court, and he maintained that the court was neither unbiased nor impartial. He contended that he had been improperly subpoenaed as a witness before the "court" while engaged in essential representation as civilian counsel of a serviceman under charges. He declared that he would not reveal the confidences of his client under such circumstances

nor subject himself by his own testimony to some criminal prosecution [R. 990-1022].

The military officers declared that petitioner, civilian counsel, was in "contempt" of the military court of inquiry, and an information [C. Tr. 2-10] was filed by the Federal prosecutor at the behest of the military in the District Court charging petitioner with violations of 50 U. S. C. 622. At the trial, a number of the military officials testified as witnesses: Colonel Perry K. Smith [R. 254]; Captain John G. Carroll [R. 654]; Lieutenant Colonel Earl E. Anderson [R. 789]; Captain Richard D. Hamilton [R. 1718]; Captain Arnold G. Hewett [R. 1743]. Many other officers appeared solely as spectators in the courtroom and their appearance was particularly noted by the trial judge. The certificate of contempt of the trial judge recites [C. Tr. 679] that "the court stated to certain officers of the U. S. Marine Corps who were present in the courtroom, that since they were lawyers they might desire to attend the session in chambers to observe the discussion and settlement of instructions and informed them they might if they desired, attend the session in chambers. Certain of them did attend the session in chambers as observers."

Throughout the trial, the trial judge evidenced a hostility to petitioner, appearing convinced that somehow petitioner had cleverly put the military "court of inquiry" to rout, that petitioner had thus thwarted justice, that justice would not be done unless petitioner was found guilty of contempt of the military court of inquiry under the information initiated at the behest of the military, and that petitioner was trying to harass the trial judge as he allegedly had done the military court. We cite a few examples from the record:

A. On the motion to dismiss the information at the commencement of the trial:

> "The Court: . . ., I don't know how you, who were called as a witness before a court of inquiry, who were not designated as a party, you who were a civilian and therefore not subject to the Code, except insofar as you might come in as a witness, could contend that you had any right to challenge anybody.
>
> Now, that is where you made your mistake. You were called as a witness, and if you would have stayed in your category as a witness you wouldn't be here today. But relying, apparently, on some advice that is questionable by certain members of the bar, you took a position attempting to depart from your category as a witness, and here you are in the federal court" [R. 194-5].

B. When objection was made to introduction into evidence of a certified copy of the transcript of the proceedings before the court inquiry instead of the original, upon the grounds that discrepancies existed between the two documents:

> "The Court: . . ., I think it is obstructionist tactics entirely, . . .
>
> I agree with you, Mr. Deutz [the prosecutor], I think it is silly, . . . But if Mr. Shibley is going to take the time of the court talking about this certified copy, we have the original here, and into evidence it will go" [R. 332-3].

C. When petitioner requested leave to submit some incomplete memoranda on various legal issues which had arisen during the trial:

> "The Court: I will take it on an installment basis if you want to put in that way, and I will hold my

breath after one installment waiting for the next. Be sure they stop at a good point. 'What will Shibley do in the next installment? He is hanging precariously on the cliff. What will he do? Be sure to see tomorrow's issue' " [R. 373].

D. The direct examination of one prosecution witness was concluded at 4:10 p.m. The customary time for adjournment was 4:30 p.m. Petitioner, in the absence of his co-counsel, began the cross-examination and at the due time asked for the examination to go over to the next day. The court insisted that the cross-examination be concluded "this evening," but after petitioner pointed out that he was not equipped by reason of health and the absence of his co-counsel, the usual adjournment was taken [R. 789-805]:

> "The Court: . . . But when you started the cross-examination of this witness, it was apparent to me that you were stalling until 4:30. I observed you look at the clock. And the questions that you were asking were not doing you any good. . . . If I were representing you and you were my client, I wouldn't let you perform in the manner that you are performing. If I were going to let you perform in the manner in which you are performing, I would just as soon toss in the sponge and enter a plea, as to let you perform as you are performing, if you were my client. . . . I am not asking you to make any statement. You are not required to say a thing. I am just giving you some advice" [R. 806-7].

E. An issue arose as to whether the entire transcript should be submitted to the jury or only a limited portion of it [R. 929-34]:

> "The Court: If you have only the questions, the directions to answer, and the refusals, there is not

very much left for the jury. If, on the other hand, this entire transcript goes to the jury, I will be perfectly frank with you, when you read that transcript the impression I get—and I am not trying these factual matters—is that Mr. Shibley just worked overtime trying to make himself some kind of a defendant in some kind of a proceeding, and that he took time and delayed the court and made repetitious objections, wandered afield" [R. 934].

F. On the motions for judgment of acquittal and to strike testimony at the close of the prosecution's case [R. 1025-43]:

"The Court: Mr. Shibley, I have read that transcript and I marvel at the patience of the court of inquiry.

This is outside the presence of the jury.

If anybody ever ragged a court of inquiry or any other court, you ragged that court. . . . I can't but escape the impression, the conclusion that you worked very diligently to get yourself into some kind of a position where you would be in trouble with some organization. I never saw a fellow work so hard to get himself in trouble with a court of inquiry, or with any court, as you did at El Toro" [R. 1043-4].

G. Petitioner sought to introduce some evidence into the record, and the court requested an offer of proof. During the course of the offer of proof [R. 1818-22], the following occurred:

"The Court: Who are you making a speech to here?

Mr. Shibley: I am making it to your Honor.

The Court: Because there is a reporter sitting over here at the table taking down this flowery oratory?

Mr. Shibley: No, I didn't see a reporter present" [R. 1822].

H. The prosecutor, during the discussion of proposed instructions, informed the trial judge that he proposed to argue before the jury "the way he [the petitioner] was horsing around[2] with the court, the court of inquiry" [R. 2143]:

> "The Court: . . . I will permit you to argue that Shibley horsed around with the court of inquiry, because I think that may be a justifiable argument . . ." [R. 2147].

I. After additional instructions had been given to the jury during their deliberations [R. 2534-5], objections were made in chambers to some of the instructions which had been given and additional instructions requested [R. 2535-44]:

> "The Court: Just a moment. Mr. Shibley's objections and requests are denied. And you have had about three or four of them, and that is all, Mr. Shibley.
>
> Before the Court of Inquiry, after taking up minutes of time and repeating statements of privilege, you would always end up and say, 'May I state further privileges,' and then it would go on again for a long time, and then you would wind up, the court would rule, and then you would say, 'May I state further privileges?' Now you have had about three or four bites at the apple. That is it.
>
> Mr. Shibley: I object to your Honor's manner of speaking to me at this time, in an angry tone of

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[2]The phrase "horsing around" appears in Berrey & Van den Bark, *The American Thesauras of Slang*, p. 988. It appears to be synonymous with the words "interfere" and "meddle" (p. 265).

voice, looking at me in what appears to be a malevolent and angry way, and I assign it as prejudicial error and misconduct.

The Court: I consider you contemptuous of this court, and we will take that matter up later" [R. 2544-5].

J. A motion for mistrial was made [R. 2547] when the United States Attorney and an assistant for the first time seated themselves at the counsel table just when the jury had returned for additional instructions. There was a claim of prejudice and probable coercion [R. 2550]:

"The Court: . . . Now I have heard everything. Talk about Alice in Wonderland. Errors assigned because the United States Attorney, who is the chief law enforcement officer of the United States in the Southern District of California, enters a courtroom where one of his assistants is trying a case. I have heard everything" [R. 2549].[3]

We do not exhaust the examples of the personal involvement of the trial judge in the conduct for which petitioner was punished in summary contempt. The certificate of contempt [C. Tr. 670-85] is replete with further instances. For example, it is alleged that petitioner was in contempt of court because he assigned as judicial misconduct the invitation by the court to the Marine officers to attend the session in chambers, as aforesaid

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[3]Although this motion for mistrial in no way involved the court, still it was included as a ground for the imposition of the prison sentence in the summary contempt proceedings [Specification XIV, *Certificate of Contempt,* C. Tr. 682].

[C. Tr. 679]; that petitioner had accused the court of bias and prejudice against petitioner and in favor of the prosecutor [C. Tr. 679-80]; that petitioner on a request for a recess had made a remark in alleged poor taste to the trial judge [C. Tr. 680]; that petitioner had assigned as error the manner in which emphasis was placed by the trial judgment upon certain portions of the instructions [C. Tr. 681]; that petitioner had assigned as misconduct the judge's manner of speaking to petitioner [C. Tr. 682].[4]

All of this as aforesaid was the forerunner to the final denunciation of the jury and the petitioner at the conclusion of the trial when the verdict of acquittal was returned,[5] as recited initially here at the commencement of this Statement of the Case.

On the issue as to whether the trial judge was qualified to conduct the summary contempt proceedings, the Court

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[4]The view of the trial judge that the petitioner had "horsed around" with the trial judge just as he had allegedly done with the court of inquiry is expressed again in the certificate of contempt: "That this course of conduct was carried on by George E. Shibley throughout the proceedings before the Military Court of Inquiry. That a similar type of proceeding and conduct was carried out by George E. Shibley acting as attorney before this court" [C. Tr. 676]. It should be noted that the court below upheld the contempt judgment because petitioner allegedly brought "the merits of the case" before the military court, into the trial App. A, p. 2).

[5]The information contained nine counts [C. Tr. 2-10]. Three counts were dismissed at the close of the prosecution's case [R. 1070]. The jury acquitted on three other counts and returned no verdict on the remaining counts [R. 2558-9]. Some months later, the remaining counts were dismissed on motion of the prosecutor.

of Appeals answered in the affirmative. It held that the trial judge had "throughout the trial, exercised admirable self restraint before the jury" (App. A, p. 4). It held that the statements of the judge to the jury after their verdict were proper. "There can be no doubt the judge had at that time made up his mind about the conduct of defendant before the court of inquiry and before him. He had the right officially to express himself as to both. Because he had a firm opinion, based upon the evidence in the case and upon the action of the defendant before him, is the fault of defendant and not of the court" (App. A, p. 4). Indeed, the Court of Appeals expressed the view that the trial judge could properly have commented on the conduct of defendant during the trial before the jury, and that this failure to so comment "may have resulted in this result [the acquittal] which he [the judge] thought unjust" (App. A, p. 4).

The sentence imposed upon petitioner was thirty days' imprisonment [R. 2599]. The Court of Appeals, while affirming the findings of contempt, remanded the cause to the *same* trial judge for consideration of sentence. This was done, according to the *per curiam* opinion, because "a long time has passed since the judgment was rendered" and because "Shibley has been convicted of a criminal charge which was argued on appeal at the same time the instant case was argued" (App. A, p. 5).[6]

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[6]The Court of Appeals also denied a purported request of petitioner to dismiss the remaining counts of the information against him for contempt of the court of inquiry (App. A, p. 5). No such request appears to have been made in the briefs on appeal or in argument, the remaining counts having previously been dismissed by a Judge of the District Court early in 1954 on motion of the prosecutor.

**The Time of the Summary Contempt Proceedings—Procedural Due Process.**

The verdict of the jury was returned on November 20, 1953 [R. 2558]. After the castigation of jury and petitioner, the trial judge stated: "You will be here Monday morning at 10:00 o'clock and the court will take up at that time the matter of summary contempt" [R. 2562].

Petitioner appeared with his counsel on Monday, November 23, 1953 [R. 2566]. The court stated that it would continue on its own motion "the matter of summary contempt to Monday, December 7th, at 10:00 o'clock in this court" [R. 2575]. The court asserted that it wanted the reporter "to write up certain designated parts" of the record [R. 2574]. Counsel for petitioner inquired as to what portions of the record the court had in mind [R. 2574]. The court replied: "I haven't definitely determined what portions of the record" [R. 2574]. Counsel inquired if the petitioner would be furnished with a copy of the portions of the record which the court ordered transcribed [R. 2575]. "Not necessarily," replied the court. "Summary contempt is not based upon the record. The record is for the court's assistance, and a summary contempt will be based, *if one is found,* upon a certificate prepared by the court certifying as to what I saw and observed in the presence of the court" [R. 2575] (emphasis supplied). Counsel for petitioner stated that "it is our position that this is a 42(b) and not a 42(a) situation, and that we are entitled to all of the protection of 42(b)" [R. 2575]. Among the decisions cited to the court [R. 2576] were *Sacher v. United States,* 343 U. S. 1, and *Cooke v. United States,* 267 U. S. 517.[7]

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[7]The decision of this Court in *Offutt v. United States,* 348 U. S. 11, had not yet been rendered, but the decision did precede the opinion of the Court of Appeals below.

Petitioner appeared with his counsel on December 7 [R. 2580]. On its own motion, the court continued the summary contempt proceedings to "December 28, 10:00 o'clock in this court" [R. 2580]. ". . . the reporter has not yet completed preparing certain parts of the transcript" [R. 2580]. Counsel for petitioner submitted an affidavit of bias and prejudice [C. Tr. 642-57] and requested that the contempt proceedings be assigned "to another judge" [R. 2580]. The court stated that "I don't think it [the affidavit of bias and prejudice] has any bearing on the matter of summary contempt. However, I will look it over before the 28th" [R. 2581].

On December 28, 1953, petitioner was hospitalized in the Long Beach Veterans Administration Hospital and at his counsel's request the proceedings were continued [R. 2584-5]. The court set the date at January 18, 1954.

On January 18, 1954, petitioner appeared with his counsel. The Court stated: "Mr. Marshall, I have prepared a certificate for summary contempt, which I propose to file this morning" [R. 2587]. A copy was then served upon counsel for petitioner [R. 2587]. Counsel inquired if he could have time to read the certificate [R. 2588]. The Court: "I will give you 10 minutes" [R. 2588]. Counsel, after these ten minutes, stated that the court was without jurisdiction; objected to any further proceedings in the matter; maintained that the court was disqualified; and that petitioner was not ready to proceed in response to the certificate because there had not even been sufficient time to read it [R. 2590]. The Court stated: "I don't want to discuss the certificate at this time, and I now, having filed the certificate, find George E. Shibley, an attorney admitted to the Bar of this Court, in summary contempt of this Court. I am now ready to pass sentence on Mr. Shibley . . ." [R. 2591].

The Court of Appeals stated that the certificate of contempt "was entered on a date considerably postponed" (App. A, p. 1). The Court of Appeals added: "Shibley complains that the certificate was not filed until two months after the verdict. The delay is not important. Indeed, it indicates the trial judge was not acting inconsiderately, but with due deliberation. The fact that there was no hearing on the certificate and that due process was thus lacking is untenable. Such delay until after trial has been given formal approval by the courts" (App. A, p. 3), citing *"Offutt v. United States,* 348 U. S. 11; *MacInnis v. United States,* 9 Cir., 191 F. 2d 157, 161, certiorari denied 342 U. S. 953" (App. A, p. 3, n. 3).

**The Contempt Certificate and the Evidence in the Record.**

The "Certificate Re Contempt of George E. Shibley, An Attorney" [C. Tr. 670-85] contains 16 specifications. Apparently because of the trial judge's view that "summary contempt is not based upon the record" [R. 2575], the certificate is devoid of any page reference to the Reporter's Transcript of proceedings. The matter is further complicated by the trial judge's statement in the certificate "that an inspection of the entire record is necessary in order to see the nature and extent" of petitioner's alleged misconduct [C. Tr. 678].

It is the contention of petitioner that the evidence in the record does not support the judgment of contempt nor justify the imposition of the sentence of imprisonment imposed upon petitioner. 18 U. S. C. 401; Fed. Rules Crim. Proc., Rule 42(a). Since this requires an analysis of the evidence as well as the general conclusions

of law and fact contained in the certificate of contempt, and in order not to unduly lengthen this Statement of the Case, we have attached such analysis as an appendix to the petition herein (App. D). We merely summarize here the conclusions of fact in this case which, it is respectfully submitted, flow from this Analysis as related to the certificate of contempt.

1. There is no evidence in the record sufficient to support the certificate or judgment of contempt.

2. Petitioner, a member of the Bar, has been sentenced to a term of imprisonment for contempt of court under circumstances and for reasons irrelevant to the exercise of the drastic power exercised by the trial judge.

3. The judgment of contempt, made some months after the trial of the cause, appears to have been based upon a failure of the trial judge to recall the actual record and his contrary rulings and actions during the trial, the complexity of the issues, and the fact that many of the matters which the judge subsequently deemed contempt of court were only legal steps taken by petitioner as counsel and accused during the trial, and so considered by the judge during the trial.

4. The record does not reflect an intent on the part of petitioner to commit contempt of court, and petitioner's specific disclaimer of such intent at the time of imposition of sentence was not disputed by the trial judge.

5. The prerogatives of the court were duly exercised at the trial and the administration of justice was not obstructed. There was no disturbance or disorder during the trial, and no contention that petitioner's manner or demeanor was other than respectful.

6. The subsequent determination of the trial judge to impose a sentence for contempt of court was infused with such considerations as the belief that petitioner, an attorney, had been too persistent in his legal objections before the military officers at the court of inquiry; that petitioner was guilty of contempt of the military body and that justice had not been done by petitioner's acquittal in the District Court; and that the trial had not been expeditiously concluded because of petitioner's persistent legal contentions made during the trial.

The Court of Appeals held that "many of the recitals of the certificate might not state specific acts which were of themselves contemptuous" (App. A, p. 3), but it held that the petitioner had "abused his position as lawyer for himself as defendant" and "fairly succeeded in taking complete control of the trial" (App. A, p. 2). There is no reference in the opinion to any particular instance during the trial which allegedly supports the judgment of contempt, but the court below held that the trial judge properly imposed the sentence of imprisonment in summary contempt proceedings when he did because, contrary to the rulings and directions of the judge, petitioner allegedly persisted in bringing before the jury the merits of the case in which petitioner had been involved with the "Marine Corps officers" (App. A, p. 2). This is a paraphrase of the certificate of contempt [C. T. 670, 681, pars. II and X], but the evidence in the record as shown by the Analysis (App. D) does not support these conclusions. The Court of Appeals, while affirming the judgment of contempt, recognized the right of petitioner to "fearless, vigorous and effective advocacy" (App. A, p. 2).

## ARGUMENT AND REASONS RELIED UPON FOR GRANTING THE WRIT.

### A.

The Court of Appeals below has decided a federal question in a way in conflict with applicable decisions of this Court and so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

### I.

### The Trial Judge Was Not Qualified to Conduct These Summary Contempt Proceedings and the Court of Appeals Erred in Remanding the Case to the Same Trial Judge Solely for Reconsideration of Sentence.

The core of the trial judge's personal feelings to petitioner, as revealed by the record and the certificate, was this: the petitioner, a member of the Bar, had somehow succeeded in harassing and impeding the military court of inquiry and that petitioner during the trial below engaged in the same conduct with respect to the trial judge with the aim of delaying and impeding the trial. It seemed to the trial judge that the petitioner had not only "horsed around" with the military court (although the record presents an opposite picture), but that the petitioner had done the same with the trial judge.

From the outset of the trial, the trial judge appeared sympathetic to the apparent plight of the military officers, insisting that petitioner, *in camera* without counsel, had no "right to challenge anybody" [R. 194] and that petitioner had acted on some questionable advice by "certain members of the bar" [R. 195], a statement left unexplained in the record. As the evidence and certificate

of contempt reveal, legal objections were treated as "obstructionist tactics" [R. 332-3]; sarcasm was turned upon petitioner's legal arguments [R. 373, 1822]; accusations of "stalling" were constantly made [R. 789-805]; petitioner was advised it would be better to "toss in the sponge" if he continued "to perform as you are performing" [R. 806-7]; time and again petitioner was reminded that he had "ragged" the court in inquiry and tried "to make himself some kind of defendant in some kind of a proceeding" [R. 934, 1043-4, 2147]; and objections to the conduct of the trial by the judge were treated as personal reflections upon the court [R. 2544-5; C. Tr. 679, 679-80, 680, 681, 682]. Even an objection in no way directed to the judge was treated as an "Alice in Wonderland" argument [R. 2549] and a contempt of the court [C. Tr. 682].

Finally, the feelings of the trial judge were revealed full blown at the conclusion of the trial when the jury was told that their verdict was "a miscarriage of justice" and that the case was a simple one "after all the smoke was blown away"; when the jury was told to remain in their seats, and petitioner was castigated because he had accused "the officers in the Marine Corps of perjury," accused the prosecutor "of dishonesty," and "accused me" of delivering the instructions in a way which favored the prosecution [R. 2559-63]. Petitioner was charged with conducting himself "in a way ill fitting a lawyer in this court" [R. 2563].[8] It was on the basis of this record

[8]In the Court of Appeals, the United States conceded that the trial judge did "let off a little steam" (Br. p. 24) at the conclusion of the trial, but it argued that this was due to the fact that petitioner "was giving the trial court the same treatment which he gave the court of inquiry" (Br. p. 7) and because the trial judge "had to resist well planned and vigorous efforts to take the control of the case out of his hands" (Br. p. 7). It was these general arguments which were accepted by the Court of Appeals.

that the trial judge deemed himself qualified to conduct summary contempt proceedings and impose a sentence of imprisonment upon petitioner.

It is respectfully submitted that the record and the certificate of contempt indicate that the judgment of the trial judge became inextricably entangled with his subjective and personal feelings against petitioner and that the interests of justice required the removal of the contempt proceedings to an impartial tribunal. Since the judgment of the trial judge was so entangled, dominating the entire trial and culminating with the statements to petitioner before the jury, the trial judge was not legally qualified to render the judgment herein. *Offutt v. United States,* 348 U. S. 11; *Cooke v. United States,* 267 U. S. 517. See, the opinion of Justice Frankfurter in *Sacher v. United States,* 343 U. S. 1, 23, and the opinion of Chief Judge Denman for a unanimous court (Bone and Pope, JJ., concurring) in *Gladstein v. McLaughlin,* 230 F. 2d 762 (C. A. 9, 1955). The matter was specifically called to the trial judge's attention when the affidavit of personal bias and prejudice [C. Tr. 642-57] was filed with the court sometime prior to the imposition of sentence and after the court had indicated at the conclusion of the trial its view that contempt may have been committed [R. 2580]. See paragraph "XV" of the certificate of contempt [C. Tr. 683-4].

The Court of Appeals appears to have misconceived the issue involved here. The question is not whether the "firm opinion" of the trial judge was the "fault of defendant and not of the court" (App. A, p. 4), but "the real issue is whether under the decision of the *Cooke* case such a ruling should have been made by the trial judge, or whether for the very purpose of vindicating justice

for which the power of summary contempt is available, the *determination of petitioner's guilt* and *the punishment properly to be meted out on a finding of guilt* should have been made in the first instance by a judge not involved, as was this trial judge, in the petitioner's misconduct." *Offutt v. United States, supra,* p. 15 (emphasis supplied).

It is submitted that the decision of the court below is in conflict with the holding of this Court in *Offutt* and related holdings, and should be reviewed by this Court in the interests of justice and the fair administration of justice.

B.

The Court of Appeals below has decided a federal question in a way in conflict with the applicable decisions of this Court; has decided an important question of Federal law which has not been, but should be, settled by this Court; and has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

II.

**The Trial Judge Was Without Power or Jurisdiction to Conduct Summary Contempt Proceedings or Impose Punishment Therein Almost Two Months After the Termination of the Trial and Petitioner Was Thus Deprived of His Liberty Without Due Process of Law Contrary to Law and the Due Process Provisions of the Fifth Amendment.**

It is respectfully submitted that the trial judge was without jurisdiction or power to conduct or punish petitioner in summary contempt proceedings under Rule 42(a) thirty-eight to fifty-eight days after the conclusion of the

trial [R. 2562, 2575, 2580, 2584, 2587]. Nothing in the decisions of this Court indicate that a power exists to summarily punish an alleged contempt committed during a trial at some undefined time long after the conclusion of the trial. The most that has been held is "that if he [the judge] believes the exigencies of the trial require that he defer judgment until its completion he may do so without extinguishing his power." *Sacher v. United States,* 343 U. S. 1, 11. The cases are clear, however, in the light of the history of the Contempt Statute, that the jurisdiction is exhausted when the exercise of the power is postponed beyond the termination of the trial. There is danger in sanctioning any lax, importunate exercise of such drastic power. See, *Nye v. United States,* 267 U. S. 517; *Pendergast v. United States,* 317 U. S. 42; *In re Oliver,* 333 U. S. 257; *Sacher v. United States,* 343 U. S. 1; *Hallinan v. United States,* 182 F. 2d 880 (C. A. 9, 1950); *MacInnis v. United States,* 191 F. 2d 157 (C. A. 9, 1950); 37 Cornell L. Quarterly 795 (1952); 24 Mississippi L. J. 245 (1953).

Even in *Sacher,* the United States conceded "that a judge could not summarily punish contempt without notice and hearing at any undefined time long after it has occurred in his presence" (p. 29). The unique issue presented here is this: Ordinarily the question arises as to whether an "exigency" or "overriding consideration" required the court to postpone punishment for summary contempt from the time it was observed during the trial to the termination thereof; here the issue is whether, the trial having been concluded, the court could still postpone summary contempt proceedings until months later. It is submitted that no reason can justify such postponement of proceedings which strip an accused of all

procedural safeguards including the right to trial by jury. Clearly, no "exigency" existed here. The only procedure under such circumstances should be notice and hearing before an impartial tribunal.

The dangers which lurk in adopting any other rule is exemplified in this case. Here, after the trial, the judge wanted time to have some portions of the record transcribed. The balance of the record depended solely on his recollection. Three days after the conclusion of the trial, the judge stated he wanted to examine certain portions of the record to determine whether a contempt should be found [R. 2575]. It was not until about two months after the completion of the trial that the judge advised petitioner as to what his contempt had been. Based upon a past recollection, a recollection which largely overlooked the actual record, a punitive sentence was imposed without a semblance of procedural due process.

The infirmities in the proceedings appear plain. The Court of Appeals held that the delay was "not important," that the absence of a hearing and the lack of due process was sanctioned by the decisions of this Court in *Offutt* and the denial of certiorari in *MacInnis*. Since these rulings do not appear to give support to the holding of the court below, and indeed are opposed thereto in principle, this Court should grant review to settle a question which looms large in the administration of summary contempt proceedings in the federal courts.

C.

The Court of Appeals below has so far sanctioned a departure by the lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

## III.

## The Certificate and Judgment of Contempt Examined in the Light of the Evidence in the Record Were Insufficient to Warrant the Exercise of the Contempt Power by the Trial Judge.

The stigma of contempt and the severe penalty of imprisonment have been imposed upon petitioner, an attorney, without consideration of the actual evidence in the record. More than 50% of the certificate of contempt is made up of general conclusions of law and fact. See Specifications I, II, III, IV, XII, XV, XVI [C. Tr. 670-8, 682, 683-5]. Most of the remaining specifications appear to be only counsel's objections to the rulings or conduct of the trial judge which it was claimed were prejudicial to petitioner's defense. See Specifications VI, VII, VIII, XI, XIII [C. Tr. 679-80, 681-2]. One specification did not involve the trial judge at all. See Specification XIV [C. Tr. 683]. All of the specifications in the certificate, when examined in the light of the actual record, show no contempt of the authority of the court, but the expeditious trial of a complex cause, vigorously contested by counsel for both sides and actively participated in by the trial judge. See Appendix D.

It is submitted that there is a great risk to impartial justice if this judgment of contempt is left unreviewed. The contempt power exercised here should be examined in the setting of the history and policy of the Contempt Statute (*Cammer v. United States*, 350 U. S. 399), and when so examined will be found to have been improvidently used. The certificate of contempt does not actually recite "the facts" as required by Rule 42(a), and the evidence does not establish a contempt of the court's "authority" nor an obstruction of the administration of justice as

set forth in 18 U. S. C. 401. "I confess that I cannot find in all this or in the evidence in the case anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words." Holmes, J., in *Toledo Newspaper Co. v. United States,* 247 U. S. 402, 425.

Since in the Statement of the Case herein, petitioner has summarized the conclusions of fact flowing from a review of the evidence contained in Appendix D, we refer here only to the rules of law which the courts below appear to have disregarded in imposing the punishment of contempt upon petitioner.

1. Punishment in summary contempt proceeding requires the support of a "solidity of evidence." *Pennekamp v. Florida,* 328 U. S. 331, 347.

2. Where there is no proof that petitioner ever violated a direct order of the court, mere general allegations that objections were too "wordy" or "rambling" or "needless" or "repetitious" should not invoke the contempt power, if the rights of litigants and the independence of the Bar are to be preserved. See, *Caldwell v. United States,* 28 F. 2d 684 (C. A. 9, 1928).

3. "Offers of proof" are often required to be made by counsel if the record on appeal is to be preserved and the rights of litigants protected. *Steinberg v. United States,* 162 F. 2d 120, 123 (C. A. 5, 1947). *Cf. Benatar v. United States,* 209 F. 2d 734, 742-5 (C. A. 9, 1954).

4. Actions taken by counsel during the course of trial, even under a mistaken view of the law, do not constitute a contempt of court. *Sprinkle v. Davis,* 111 F. 2d 925, 930 (C. A. 4, 1940).

5. An assertion that a trial judge's ruling during the trial does not give the appearance of impartiality is not a contempt of the court. *Cf., Whitaker v. McLean,* 118 F. 2d 596 (C. A. D. C. 1941).

6. It is not a contempt of court to point out that the trial judge appeared to emphasize only certain portions of the instructions. *Northwestern Mut. Life Ins. Co. v. Stevens,* 71 Fed. 258, 264 (C. A. 8, 1895). *Cf., Smith v. United States,* 230 F. 2d 935 (C. A. 6, 1956).

7. Time may be precious to a court, and the due administration of justice essential, but the interests of justice are also served by an independent Bar and a judicial trial in which the truth is patiently sifted out from falsehood and the liberties of an individual substantially protected. *Offutt v. United States,* 348 U. S. 11; *Powell v. Alabama,* 287 U. S. 45; *Gallagher v. Municipal Court,* 31 Cal. 2d 784, 797, 192 P. 2d 905; Cooley, *Const. Lim.* (8th Ed., 1927), Vol. I, p. 704; Oswald, *Contempt of Court* (1911), p. 54.

This Court has held in both *Sacher* and *Offutt* that while the fair administration of justice requires an orderly trial, still the drastic power of contempt should not be used to limit fearless, vigorous and effective advocacy, if the independence of the Bar and the liberty of the individual are to be preserved. Although this Court has drawn the line in principle, it has not considered the application of the principle to a particular state of facts. It is submitted that the case herein presents a situation in which the line has been seriously overstepped, and constitutes an unprecedented use of the contempt power under circumstances which threaten the fundamentals of a fair trial and the search for justice. This case, as well as the

case in No. 243, moreover, appear to reflect a disturbing insistence by military officials for the imposition of penal sanctions upon civilian counsel successfully engaged in defense of military personnel which requires critical examination of this Court. Review is important, therefore, not only for this petitioner, but for all attorneys and agencies of government concerned with the administration of military justice and criminal justice in the federal courts.

## Conclusion.

The petition for a writ of certiorari should be granted, the writ issued, and the judgment of contempt reversed.

Respectfully submitted,

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